Quaker Products (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — INCOME TAX APPEAL NO R1–14–13 OF 1997
ABDUL KADIR SULAIMAN J
6 MAY 1998

Revenue Law *— Income tax — Deduction — Contractual arrangement by appellant with third parties for manufacturing and producing of products — Whether appellant entitled to deduction under Sch 2 para 4(1)(b) of the Investment Incentives Act 1968 — Whether appellant must be the direct manufacturer for purposes of the Act — Whether language of the Act excluded application of agency principles — Investment Incentives Act 1968 Sch 2 para 4(1)(b)*

The appellant was incorporated on 9 June 1972 and on 1 September 1975 entered into a contract with Federal Oats Mill Sdn Bhd ('Federal') relating the manufacture of rolled oats under the name 'Quick Quaker Oats' by Federal for the appellant. On 1 February 1982 the appellant entered into another contract with Kontrak Manufacturing Services Sdn Bhd ('KMS') relating to the manufacture of a liquid multi-surface cleaner under the trade name 'Fantastik Spray Cleaner' by KMS for the appellant. The appellant at all relevant times owned the trade name for both products and retained control over the sourcing of new materials and packaging materials and the designating of specific suppliers and prices payable as well as the specific quantity to be ordered. The appellants purchased from Federal and KMS its entire requirements for the Malaysian and Singapore markets. In relation to the Quick Quaker Oats product, the appellant had no buildings and machinery of its own for manufacturing purposes but purchased finished products in bulk from Federal and subsequently distributed and marketed them in Malaysia and Singapore through its appointed agents. In addition, the appellant also did not possess the manufacturing licence from the Customs and Excise Department which was instead obtained by Federal. The appellant was also responsible for the quality control as well as the giving of warranty in respect of the product and the monitoring of the shelf life of the products concerned. However, the appellant employed agents and distributors for the sale of the two products. Pursuant to s 27 and Sch 2 para 4 of the Investment Incentives Act 1968 ('the Act'), the appellant applied for deduction for the promotion of export for its export of the Quick Quaker Oats and Fantastik Spray Cleaner manufactured by its two contractors, Federal and KMS. The claim was disallowed by the respondent on the basis that the products were not manufactured directly by the appellant. On appeal, the Special Commissioners dismissed the appeal

on the basis that the appellant was not the manufacturer/producer of the two products brought out by Federal and KMS in the light of the language of Sch 2 para 4 of the Act. The Special Commissioners held that contract manufacturing by way of contractual agreements did not confer the appellant attributes of a full fledged manufacturing/producing undertaking entitled to be the legitimate beneficiary of the double deduction incentive on expenses and outgoings in the bid for expanded export markets. The appellant appealed by way of case stated to the High Court, contending that the two products were on the facts of the case clearly manufactured by the appellant.

Held, allowing the appeal:

Paragraph 4(1)(b) of Sch 2 to the Act listed out seven situations whereby a company involved with a particular product for the export of the same would qualify for the allowance. Each of the situations must be construed disjunctively and it was enough if the particular company could satisfy any one of the seven situations. The fact that the appellant did not have its own in-house plant and had engaged contractors to produce the goods for the appellant for the purposes of marketing and export did not mean that the appellant was not the manufacturer and producer of the goods within the provisions of the Act.

Upon the facts the Special Commissioners wrongly and narrowly construed the meaning of the words of para 4(1)(b) of Sch 2 to the Act so as to defeat the very principle of agency. The two products after their production by Federal and KMS had no association at all with the said contractors but rather with the appellant who owned the trade marks. The determination by the Special Commissioners was inconsistent with and unsupported by the facts as agreed and as found and in fact was contrary to the very findings of fact by the Special Commissioners whereby the appellant was found to be principally engaged in the business of manufacturing through its contractors in respect of the two products (see pp 715G–I and 716A–E).

[Bahasa Malaysia summary

Perayu diperbadankan pada 9 Jun 1972 dan pada 1 September 1975 telah mengikat kontrak dengan Federal Oats Mill Sdn Bhd ('Federal') berkaitan pembuatan oat gulung di bawah nama 'Quick Quaker Oats' oleh Federal untuk perayu. Pada 1 Februari 1982 perayu telah mengikat satu lagi kontrak dengan Kontrak Manufacturing Services Sdn Bhd ('KMS') berkaitan pembuatan pencuci cair serba aneka di bawah tanda niaga 'Fantastik Spray Cleaner' oleh KMS untuk perayu. Perayu pada semua masa relevan memiliki hak tanda niaga untuk

kedua-dua keluaran dan mengekalkan kawalan ke atas sumber bahan baru dan pembungkusan bahan dan melantik pembekal tertentu dan harga yang harus dibayar serta kuantiti tertentu yang harus dipesan. Perayu telah membeli segala keperluan untuk pasaran Malaysia dan Singapura daripada Federal dan KMS. Berkaitan dengan keluaran Quick Quaker Oats, perayu tidak mempunyai bangunan dan mesin sendiri untuk tujuan perkilangan tetapi membeli keluaran yang siap secara pukal daripada Federal dan kemudiannya mengedar dan memasarkannya di Malaysia dan Singapura melalui ejen-ejen yang dilantiknya. Tambahan pula, perayu juga tidak mempunyai lesen perkilangan daripada Jabatan Kastam dan Eksais yang sebaliknya telah diperolehi oleh Federal. Perayu juga bertanggungjawab atas kawalan mutu dan memberi jaminan berkaitan dengan keluaran tersebut dan mengawal selia jangka hayat penggunaan keluaran berkenaan. Namun demikian, perayu telah menggaji ejen-ejen dan pengedar-pengedar untuk jualan dua keluaran tersebut. Menurut s 27 dan Jadual 2 perenggan 4 Akta Insentif Pelaburan 1968 ('Akta tersebut'), perayu memohon potongan untuk promosi eksport untuk mengeksport Quick Quaker Oats dan Fantastik Spray Cleaner yang dibuat oleh dua kontraktornya, Federal dan KMS. Tuntutan tidak dibenarkan oleh penentang atas dasar bahawa keluaran tersebut tidak dikilangkan secara terus oleh perayu. Atas rayuan, Pesuruhjaya Khas menolak rayuan atas dasar bahawa perayu bukanlah pengilang/pengeluar dua keluaran yang dikeluarkan oleh Federal dan KMS memandangkan bahasa Jadual 2 perenggan 4 Akta tersebut. Pesuruhjaya Khas memutuskan bahawa perkilangan kontrak melalui perjanjian kontraktual tidak mengurniakan kepada perayu sifat-sifat suatu perusahaan perkilangan/pengeluaran sepenuhnya yang berhak menjadi benefisiari sah insentif potongan berganda atas perbelanjaan dan wang keluar dalam bida untuk pasaran eksport yang diluaskan. Perayu membuat rayuan melalui kes yang dinyatakan kepada Mahkamah Tinggi, dengan menghujahkan bahawa atas fakta-fakta kes adalah jelas dua keluaran tersebut dikilangkan oleh perayu.

Diputuskan, membenarkan rayuan:

Perenggan 4(1)(b) Jadual 2 Akta tersebut menyenaraikan tujuh situasi di mana syarikat yang terlibat dengan suatu keluaran tertentu untuk eksport layak untuk potongan tersebut. Setiap situasi mestilah ditafsirkan secara berasingan dan adalah memadai sekiranya syarikat berkenaan dapat memenuhi salah satu daripada tujuh situasi tersebut. Hakikat bahawa perayu tidak mempunyai mesin perkilangan sendiri dan mengambil khidmat kontraktor untuk menghasilkan barangan untuk perayu bagi tujuan pemasaran dan eksport tidak bermakna bahawa perayu bukanlah pengilang dan pengeluar barangan dalam lingkungan peruntukan Akta tersebut.

Berdasarkan fakta-fakta, Pesuruhjaya Khas telah tersilap dan mentafsir secara sempit maksud perkataan-perkataan perenggan 4(1)(b) Jadual 2 Akta tersebut hinggakan menewaskan prinsip utama agensi. Dua keluaran tersebut selepas pengeluaran mereka oleh Federal dan KMS tidak kena-mengena sama sekali dengan kontraktor-kontraktor tersebut tetapi dengan perayu yang memiliki tanda niaga tersebut. Keputusan Pesuruhjaya Khas tak konsisten dengan dan tidak disokong oleh fakta-fakta seperti yang dipersetujui dan didapati dan pada hakikatnya bercanggah dengan keputusan fakta oleh Pesuruhjaya Khas yang mana perayu didapati terlibat secara utama dalam kegiatan perkilangan kedua barangan tersebut melalui kontraktornya (lihat ms 715G–I dan 716A–E).]

Notes

For cases on deduction for income tax, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1796–1822.

Case referred to

Cape Brandy Syndicate v IRC 12 TC 358 (refd)

Legislation referred to

Investment Incentives Act 1968 s 27, Sch 2 para 4(1)(b)
Sales Tax Act 1972

S Woodhull (*Goh Ka Im* with him) (*Shearn Delamore & Co*) for the appellant.

Kok Keng Fai (Pegawai Undang-Undang, Lembaga Hasil Dalam Negeri Malaysia) for the respondent.

Cur Adv Vult

Abdul Kadir Sulaiman J: This is an appeal by way of case stated by Quaker Products (M) Sdn Bhd against the deciding order of the Special Commissioners of Income Tax of 17 May 1994 holding that the appellant was not the manufacturer/producer of the various exported goods of the appellant which would entitle it to the deductions for purpose of tax under the Investment Incentives Act 1968 ('the Act'). The facts before the Special Commissioners as agreed and as found by them are that the appellant was incorporated in Malaysia on 9 June 1972. On 1 September 1975, the appellant entered into a contract with Federal Oats Mills Sdn Bhd ('Federal') relating to the manufacture of rolled oats under the trade name of 'Quick Quaker Oats' belonging to the appellant. On 1 February 1982, the appellant entered into another contract, this time with Kontrak

A Manufacturing Services Sdn Bhd ('KMS') relating to the manufacture of a liquid multi-surface spray cleaner under the trade name of 'Fantastik Spray Cleaner' also belonging to the appellant. The appellant's organization in Malaysia comprised three departments, viz the marketing, finance and quality assurance departments respectively. Principally, the appellant was engaged in the business of the manufacture (through its contractors) and B wholesale of oats. In respect of Malaysia and Singapore, Federal operated as the sole licensee to contract manufacture Quaker Oats for the appellant, and KMS was the contract manufacturer having been granted exclusive rights of using the licensor's know-how for manufacturing Fantastik Spray Cleaner and marketing the same between 1982 and 1984 when the appellant C as the licensee ceased the sale of the product. The licensor was Morton Norwich Products Inc (a company incorporated in the USA). The exclusive rights for the appellant to use the know-how to manufacture and market Fantastik Spray Cleaner in Malaysia and Singapore was given by Morton Norwich Products Inc pursuant to a licence agreement entered into with the appellant on 21 July 1981.

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As regards the trade mark of Quaker, it was registered under the name 'Messrs The Quaker Oats Co' as from 9 November 1955. The registered owner was resident in the United States of America. The appellant enjoyed the exclusive right and licence to use the trade mark and name 'Quaker' in Malaysia and Singapore and to produce Quaker Oats in respect of both the E territories. In 1979, the appellant became a wholly-owned subsidiary of Quaker Products Australia Ltd (a company incorporated in Australia), with the Quaker Oats Co in America as the ultimate holding company.

Reverting back to the position in Malaysia concerning the Federal and KMS agreements which the appellant had entered into, the appellant at all F relevant times retained control over the sourcing of raw materials and packing materials, whether in the form of tin cans or aluminium foils or corrugated carton boxes etc, and the designating of specific suppliers and prices payable and specific quantities to be ordered of each. The appellant purchased from the two contractors its entire requirements for the Malaysian and Singapore markets at previously agreed rates. This price was of the G sum total of Federal's actual factory cost per case including freight, insurance and storage charges, government taxes and depreciation on buildings and machinery plus margin profit as agreed upon between them. The property and ownership in the finished products passed to the appellant only upon delivery. Federal contracted to produce Quaker products in accordance H with the written manual, the terms of which were incorporated into the written agreement. To this end, Federal devoted 90% of its production capacity to produce for the appellant during the relevant period while the remaining 10% capacity was applied to produce its own in-house brand of rolled oats of comparable quality sold under the brand name 'Captain Oats'. For quality control purposes, batch samples taken in accordance I with the manual were consigned by Federal direct to Quaker USA's research and development facility at Barrington, Illinois, USA every three

months for analysis and report. In the course of the manufacturing process, samples were taken at specific control points therein and tested in respect of each stage of production. In addition, the appellant was known to buy products at random in the open market for testing from time to time. These arrangements complemented the in-house quality control by Federal's own quality control laboratory. The quality control officer of the appellant is the quality assurance manager who liaises closely with staff members of Federal's in-house quality control unit headed by the quality control manager and pays intermittent visits to the manufacturing facility — four visits in 1982. In 1980, however, the appellant had no quality assurance manager in Malaysia but made do with technical personnel from the ultimate holding company in the USA paying periodic visits to Federal's manufacturing facility. As regards the production process of the appellant's oat products ie white oat for flakes, instant oats etc, the raw oats purchased from suppliers in Australia — the Grain Pool Australia — in uncooked state and covered with husks are subjected to a series of treatments by Federal as contract manufacturer in accordance with the written agreement. Once the raw oats are cleaned to remove impurities, the oats are 'hulled' to remove their outer husk and the clean oats toasted, cut into smaller pieces, moisturized, steamed and flaked before being packed as Quick Quaker Oats for sale.

The appellant had no buildings and machinery of its own for manufacturing purposes but purchased finished products in bulk from Federal and subsequently distributed and marketed them in Malaysia and Singapore through its appointed agents. Federal's authority to manufacture rolled oats was in pursuance of a licence issued by the Director General of Customs and Excise for the period from 2 November 1988 vide Licence No A 028860 dated 3 March 1989. The appellant had no such licence of its own so issued.

The accounting year of the appellant was the year ending 30 June. The annual accounts up to the year ending 30 June 1985 were prepared by its then tax agents and auditors, Kassim Chan & Co, while the annual accounts for the year ending 30 June 1986 and subsequent years by its new tax agents and auditors, Arthur Andersen & Co.

The appellant provided Federal with inputs on projection of the following month's production and a three-month rolling forecast to facilitate planning of production to meet fluctuating market demands. Based on this production projection, Federal placed firm orders for raw oats with the Australian suppliers, the Grain Pool Australia. The appellant had, by virtue of agreement in writing, exclusive use of the Quaker Company's distinctive logo in Malaysia and Singapore. Warranty in respect of product and shelf life was part of the responsibilities of the appellant. The appellant did not itself engage in the distribution or marketing activities. Instead it entered into exclusive sale and distribution agreements with Messrs Muller & Phipps (M) Sdn Bhd which underwent a change of name later to Getz Corp (M) Sdn Bhd, to market its range of products in Malaysia and

likewise with the distributor's associate company there in relation to the Singapore market. Although presently royalty is payable to the Quaker Oats Co in the USA, during the material period no royalty was paid. Dividends were, however, paid to the appellant's Australian parent company in respect of its equity holding. So much for the facts ascertained before the Special Commissioners.

Pursuant to s 27 of the Act and its Sch 2 para 4 the appellant made a claim to the respondent for deduction for promotion of export for its export of Quick Quaker Oats and Fantastik Spray Cleaner, manufactured respectively by the two contractors, Federal and KMS. The respondent disallowed the claim on the ground that they were not manufactured directly by the appellant. As a result of the disallowance, the respondent issued six notices of additional assessments each dated 9 August 1985 and one dated 6 August 1985 to the appellant covering the years of assessment 1977 to 1984 totalling in all RM1,116,138.05. However, the amount in dispute involving the disallowance is only to the extent of RM294,848.30 of the total amount involved. On appeal to the Special Commissioners, it was dismissed on the ground that the appellant was not the manufacturer/producer of the two products brought out by Federal and KMS. Before the Special Commissioners, the contention of the appellant was that the products for the purpose of s 27 and Sch 2 of the 1968 Act were produced in Malaysia by the appellant and therefore entitled to allowances for the purpose provided therein. As such the said assessments relating to the above deductions totalling RM294,848.30 should be discharged. On the other hand, the respondent contended that the two products *were not manufactured by the appellant* so that the outgoings incurred by the appellant should not be allowed to be deducted under the said provisions of the Act. As such, the said additional assessments relating to RM294,843.30 should stand. Paragraphs 8 and 9 of the agreed statement of facts put before the Special Commissioners, exhibited as 'A' in this case stated, state as follows:

> 8 It is the contention of the appellant that the deductions claimed by the appellant were outgoings and expenses incurred by the appellant primarily and principally for the purpose of seeking opportunities, or in creating or increasing a demand for the export of Quick Quaker Oats and Fantastik Spray Cleaner, *produced* in Malaysia by the appellant pursuant to s 27 and Sch 2 of the Investment Incentives Act 1968. As such, the said assessments relating to the above deductions totalling $294,848.30 should be discharged.
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> 9 It is the contention of the respondent that the Quick Quaker Oats and Fantastik Spray Cleaner were not *manufactured* by the appellant so that the outgoings and expenses incurred by the appellant should not be allowed to be deducted under s 27 and Sch 2 of the Investment Incentives Act 1968. As such, the said additional assessments relating to $294,848.30 should stand. (Emphasis added.)

Section 27 of the Act is a provision allowing the Minister to make rules prescribing deductions in respect of outgoings and expenses incurred by a

taxpayer for the promotion of exports from Malaysia. Schedule 2 thereof is the Income Tax (Promotion of Exports) Rules 1968. On the issue before the Special Commissioners, para 4(1) of Schedule 2 is relevant and it states as follows:

> Subject to these rules, for the purpose of ascertaining under the principal Act the adjusted income of an approved company from its business for the basis period for a year of assessment, there shall be allowed as a deduction any outgoings and expenses of the kind described in paragraph (2) which —
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> (a) were *incurred* by that company during that basis period with respect to that business; and
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> (b) were incurred primarily and principally for the purpose of seeking opportunities, or in creating or increasing a demand, for the export of goods *manufactured, produced, assembled, processed, packed, graded or sorted* in Malaysia *by that company*. (Emphasis added.)

It was submitted before the Special Commissioners and before me by learned counsel for the appellant that under para 4 of the said Sch 2 the appellant was entitled to a deduction under any of the seven different situations mentioned therein as regards expenses and outgoings incurred in the export of goods which includes manufacturing or producing. Apart from the six independent words ignored, the suggestion that the appellant was not a manufacturer is inconsistent with, contradictory of and wholly unsupported by the evidence. It was further submitted that the scope for the inferences upon facts must be restricted to a determination of whether the products in question have been manufactured, produced, assembled, processed, packed, graded or sorted by the appellant. Even on the issue of the manufacture of the said goods, the only reasonable conclusion to be drawn from the facts and one not permissive of any other inference, is that the appellant had caused into being the manufacture of the relevant products and effected their export. By entering into an agreement with Federal and KMS relating to the manufacture of the products, the appellant had given rise to, brought about or brought into existence the products. The appellant was instrumental in causing the products to be produced. The appellant's business had at all times been the business of manufacturing through its contractors, and wholesaling for oats. The two contractors merely occasioned the manufacture of the products on behalf of the appellant. The real relationship between the appellant and the two contractors is that of principal and contractors. The appellant is the producer which has caused the production of the products and Federal and KMS are merely the contractors who have occasioned the manufacture of the products on behalf of the appellant. In the circumstances, learned counsel submitted that the products were manufactured or in the alternative produced by the appellant.

For the respondent, it was submitted by its learned counsel that the important point to bear in mind under the Schedule is that the business of the appellant must come within the six categories mentioned in r 4(1)(b) of Schedule 2 to the Act which is 'manufactured, produced, assembled,

processed, packed or sorted in Malaysia by that company', in order for the appellant to enjoy the deduction claimed. He laid stress on the words 'by that company' appearing at the end of sub-para (b) of para 4 of the Schedule meaning that the manufacture etc appearing in that paragraph must be that of the appellant directly and not through contractors. It is further submitted by learned counsel that a product caused to be manufactured by the appellant through a third party, in this case the contractors, is not a product manufactured by the appellant. It is the third party which manufactured them. Being instrumental in causing the products to be produced is not the same as producing the products themselves. The products were produced by the third party. Being responsible for the packing of the products is also not the same as packing the products themselves by the appellant. The products were packed by the third party, so submitted learned counsel. He cited the case of *Cape Brandy Syndicate v IRC* 12 TC 358 and urged upon me to apply the principle of strict interpretation here because the words 'through its contractors' are missing from the said sub-para (b) of para 4 of the Schedule to accommodate the appellant. As such from the evidence both documentary and oral, it was clear that the appellant's business is not that of 'manufacturing, production, assembling, processing, packing or sorting of Quick Quaker Oats or Fantastik Spray Cleaner'. The notes of accounts of the appellant were closer to that of an agent for sale or wholesaling, so submitted learned counsel. In the audited accounts for the year 1986, it was stated that the appellant was engaged in the business of manufacturing (*through its contractors*) and wholesale of oats. According to learned counsel, to be a manufacturer in Malaysia, the appellant must satisfy the court that it had a manufacturing licence and was engaged in manufacturing and that it had submitted returns to the Director General of Customs and Excise under the Sales Tax Act 1972. In this case, according to him, it was Federal under the Sales Tax Act 1972 who is the taxable person and who paid the sales tax. The appellant is a mere consumer whose goods were bought inclusive of sales tax. To contend that an act of manufacturing can be done vicariously by way of contractual agreement is stretching the term 'manufacturing' to a ridiculous conclusion, says learned counsel for the respondent. In the circumstances it cannot be said that the appellant was principally engaged in the said business. All the acts are being done by Federal and KMS as the contract manufacturers and the agreements they entered into with the appellant are mere sale and purchase agreements for the sale of the products by the contract manufacturers. Furthermore, the appellant having bought the product from Federal did not sell the product itself but instead sold it to Muller & Phipps at a profit and the latter itself did the distribution of all the products. From the facts disclosed, the appellant purchased the products from the contractors and the property in them passed to the appellant only upon their delivery. In the case of Federal, 90% of its production capacity was only devoted to the production of the products for the appellant. Also, the appellant had no building or machinery of its own for manufacturing purpose. Such is the submission

by learned counsel for the respondent in supporting the decision arrived at by the Special Commissioners.

In the grounds of decision, the Special Commissioners said as follows:

> In effect, therefore, this appeal turns on whether or not the actual business activities of the appellant in the basis periods for the relevant years of assessment — seven in all — constituted manufacturing, producing, assembling, processing, packing, grading or sorting within the meaning of para 4 of Sch 2 to the Investment Incentives Act 1968 in circumstances where all the manufacturing, producing etc, was entirely in the domain of two contract manufacturing companies ... .
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> Both the contract manufacturing companies which in each case acted as the instrumentality for the manufacturing, producing, etc although also incorporated in Malaysia, were unconnected to the appellant (such as for example, through cross-holding of equity or common directors) save for contractual agreements with the appellant stipulating the contractual agreements for contract manufacturing for the appellant stretching over a number of years.

Having analysed the facts as presented by the evidence before them, the Special Commissioners concluded as follows:

> 19 This appeal really turns on the all-important answer to the key issue of whether the evidence taken as a whole is supportive of an inference that in the relevant basis periods for the concerned years of assessment the appellant was in fact carrying on a business of manufacturing or producing etc and the relevant expenses and outgoings for which double deduction is sought were principally directed to promotion of its finished products in export market. Going by the foregoing analysis, in the instant case it is clear that despite being the registered user of the trade mark locally or the duly appointed local licensee, the appellant was not minded to opt for in-house production particularly in the earlier years covered by the appeal when the business was operated on a shoestring — with only two employees in 1977, 1978 and 1979. Incrementally greater involvement with the passage of time such as sponsoring inspection visits by engineers from the ultimate parent company to the producing facility owned by Federal and familiarization visits by Federal's chief miller to the USA every three years or so as needed are consistent with determined efforts to protect the brand name and maintain standards. *The thrust of the evidence is on balance consistent with the inference that the manufacturing, producing, etc through contract manufacturers by contractual agreements as in the instant appeal did not confer on the appellant the attributes of a full-fledged manufacturing/producing undertaking entitled to be the legitimate beneficiary of the double deduction incentive on expenses and outgoings in bids for expanded export markets.*
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> 20 Having regard to the specific language in which para 4 of Sch 2 to the Investment Incentives Act 1968 is couched, targeted specifically at stimulating 'the export of goods manufactured, produced, assembled, processed, packed, graded or conclude in the circumstances of this appeal that the appellant was 'manufacturing' or 'producing' within the meaning of para 4 of Sch 2 to the Investment Incentives Act 1968 whatsoever.

21 We, therefore, confirm unanimously the notices of additional assessment for the Years of Assessment 1977 to 1982 and 1984, seven in all, and dismiss the appeal.

Judging from what was said by them in para 19 above and the decision on the appeal before them as contained in para 21 thereof, I notice that there are some words missing from para 20 thereof, of the copy of case stated, ie between the words 'manufactured, produced, assembled, processed, packed, graded or' and the words 'conclude in the circumstances of this appeal' appearing in the paragraph thereof. Based on para 21 it is clear that the Special Commissioners were of the view that the appellant was not 'manufacturing' or 'producing' the products in the light of the specific language in which para 4 of Sch 2 to the Act is couched. They drew the inference that 'the manufacturing, producing etc through contract manufacturers by contractual agreements did not confer on the appellant the attributes of a full-fledged manufacturing/producing undertaking entitled to be the legitimate beneficiary of the double deduction incentive on expenses and outgoings in bid for expanded export markets'.

Thus the issue for determination of this court in this appeal by case stated is whether on the facts before the Special Commissioners the Quick Quaker Oats and Fantastik Spray Cleaner brought out in the export market in the circumstances would entitle the appellant to make deductions from its adjusted income from its business under para 4(1)(b) of Sch 2 to the Act for the purpose of its income tax. The prerequisite of that paragraph is that the said income must have been incurred primarily and principally for the purpose of seeking opportunities, or in creating or increasing a demand, for the export of goods *manufactured, produced, assembled, processed, packed, graded or sorted in Malaysia by that company*. The contention of the appellant as stated in the agreed statement of facts is that those goods were produced by the appellant. While the contention of the respondent is that they were not manufactured by the appellant. The Special Commissioners in their deciding order of 17 May 1994, on the other hand, held that the appellant was not the manufacturer/producer of the products and therefore not entitled to the deductions. Having considered every aspect of the matter, on the facts and the law I find it hard to agree with the submissions of the respondent and the findings of the Special Commissioners. Paragraph 4(1)(b) of the said Schedule listed out seven situations, as emphasized above, under which the company involved with the product would qualify for the allowance. In my view, it is not necessary for the particular company to satisfy all the situations listed therein before being so qualified. It is enough if it can satisfy its involvement in any one of those seven situations. This is so because of the use of the word 'or' in the said phrase which, unless it is expressed otherwise, means that each of the various situations stated must be construed disjunctively. Each is independent of the other. No doubt from the facts before the Special Commissioners, the appellant did not do any of those matters by itself but had it done by the respective contractors on its behalf. From the agreements entered into by the appellant with Federal and KMS to bring about the

existence of the products, the inference is none other than that the two contractors were the agents of the appellant in the manufacturing and producing of the products for the appellant to enable the products in question to be marketed locally and for export by the appellant. I find that the Special Commissioners had, upon the facts, wrongly construed the meaning of the words of para 4(1)(b) of Sch 2 to the Act and their intent. They have construed the words so narrowly as to defeat the very principle of agency. Those products after their production by Federal and KMS have no association at all with the contractors. In all respect, their association is that with the appellant who owns the trade marks. The Special Commissioners had arrived at a decision based on a misconception of law in that work carried out by a contract manufacturer for the appellant as the licensed producer was held to be in effect that of the contractor and not that of the appellant. Their determination was clearly inconsistent with and unsupported by the facts as agreed and as found and in fact was contradictory of the very findings of facts by them. Upon the facts and in law, I find that there cannot be any other inference than that the products in question were caused to be manufactured and clearly produced by the appellant. It is so caused to be manufactured because of the finding by the Special Commissioners that the appellant was principally engaged in the business of manufacturing (through its contractors), ie Federal and KMS in respect of the two products. For the purpose of sub-para (b) of para 4 of the Schedule, the products in question are the products of the appellant. The appellant, according to the facts, at all relevant times retained control over the sourcing of raw materials and packing materials, whether in tin cans or aluminium foils or corrugated carton boxes and the designated specific suppliers and prices payable and specific qualities in order of each. The warranty over the quality of the products and their shelf lives was the responsibility of the appellant and not that of the contractors. The agents engaged in the distribution or marketing activities of the products in Malaysia and Singapore were appointed by the appellant. The primary error committed by the Special Commissioners stemmed from one simple misconception of law, namely that because the appellant did not have its own in-house plant and had engaged contractors to produce the goods for the appellant for the purposes of marketing and export, the appellant was not the manufacturer or producer of the products. It was for this reason the Special Commissioners decided that the appellant was not entitled to the benefit given by para 4 of Sch 2 to the Act. As to the price paid by the appellant for the finished products to the respective contractors, it is my finding that although the purchase of the products from the contractors by the appellant was at a price which included reimbursement of all costs and a predetermined margin of profit, this was not an ordinary open-market transaction. The products were to be 'sold' only to the appellant in pursuance of the agreements entered into between them in their arrangement to manufacture the appellant's products on its behalf. It was a work done for and on behalf of the appellant, which fact was acknowledged by the

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Special Commissioners themselves. For all those reasons, on the facts found and stated by the Special Commissioners, I hold that their decision in dismissing the appeal by the appellant is not correct in law. I accordingly allow this appeal by case stated with costs to the appellant. The decision of the Special Commissioners is accordingly set aside.

Appeal allowed.

Reported by Lew Chee Seong